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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-4461

LOCAL 300, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, an unincorporated association; MANUEL RENTERIA and CARLOS ENRIQUEZ,

Petitioners,

vs.

ALFRED P. MAGALLANES and ANTONIO E. OLEA in behalf of themselves and all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of California, Second Appellate District, Division One.

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IN THE

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October Term, 1974
No. .....

LOCAL 300, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, an unincorporated association; MANUEL RENTERIA and CARLOS ENRIQUEZ,

Petitioners,

vs.

ALFRED P. MAGALLANES and ANTONIO E. OLEA in behalf of themselves and all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of California, Second Appellate District, Division One.

Local 300, Laborers' International Union of North America, an unincorporated association; Manuel Renteria and Carlos Enriquez pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, entered on July 22, 1974.

Opinion Below.

The Opinion of the Court of Appeal is officially reported at 40 Cal. App. 3d 809 and is attached to this Petition as Appendix A.

A Petition for Hearing in the Supreme Court of California was duly filed and hearing denied on September

19, 1974. The judgment of the Court of Appeal became final on September 23, 1974.

Jurisdiction.

Jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. May the court entertain an action for damages in the face of a pending unfair labor practice charge of primary federal concern and delegated by Congress exclusively to the National Labor Relations Board?

2. Does the existence of a collective bargaining agreement out of which an unfair labor practice may arise create a duality of independent remedies including court jurisdiction, even though Congress has delegated exclusive jurisdiction over the unfair labor practice to the National Labor Relations Board?

3. Is there court jurisdiction over the alleged breach of the duty of fair representation involving matters of primary administrative concern which had been delegated by Congress exclusively to the National Labor Relations Board for resolution?

4. Does Section 301 of the Act permitting lawsuits for breach of contract extend to an action by a union member against his union for commission of an unfair labor practice over which the Board has exercised jurisdiction?

5. Does Section 301 of the Act permitting suits for damages for breach of contract between employers and unions extend to internal disputes between unions and members and unrelated dealings with employers?

6. May a member of a union who has filed unfair labor practice charges over which the National

Labor Relations Board has exercised jurisdiction, thereafter file a lawsuit seeking damages for the very same acts without exhausting the statutory administrative remedy provided for in the Act?

7. May a union member, under any applicable federal law, hold individual officers of the union liable for breach of the duty of fair representation or is such liability limited to the union?

Statutory Provisions Involved.

Title 29 U.S.C.

158 Unfair labor practices.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [§157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Title 29 U.S.C.

185. Suits by and against labor organizations.—(a) Suits for violation of contracts between an employer and

a labor organization representing employees in an industry affecting commerce as defined in this Act [§§141-144, 151-158, 159-168, 171-182, 185-187 of this title], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Title 29 U.S.C.

187. Unlawful activities of labor union—Right of action for injury.—(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended [§158(b)(4) of this title].

(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof [§185 of this title] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Statement of the Case.

This is an appeal from the judgment of the trial court sustaining without leave to amend the demurrer of petitoners and respondents to the complaint and the entry of dismissal thereafter. This judgment was reversed by the Court of Appeal and a hearing denied by the California Supreme Court.

Statement of Fact.

On or about July 27, 1972, one of the named defendants in this action, Alfred P. Magallanes, filed unfair labor practice charges against respondent Local 300, Laborers International Union of North America. The unfair labor practice charges complained about the identical acts complained of in this lawsuit.

The subject lawsuit has been brought by two members of Local 300, Laborers' International Union of North America, purportedly on behalf of themselves and all other members of Local 300 who are similarly situated, alleging that the Union has practiced discrimination in the dispatch of members of Local 300 from the hiring hall to jobs. It is alleged that the hiring hall is established by collective bargaining agreement with employers. The plaintiffs seek recovery of alleged special, general and punitive damages based upon the alleged unfair labor practices.

Subsequent to the decision of the trial court and while the matter was pending before the Court of Appeal, both appellants and respondents filed requests for the court to take judicial notice of the proceedings had before the National Labor Relations Board subsequent to the entry of judgment of the trial court. On March 9, 1974, the Court of Appeal granted the request to take judicial notice.

The request to take judicial notice indicated that:

(1) Prior to the filing of this lawsuit a charge had been filed with the National Labor Relations Board in case No. 31-CB-1066 of the files and records of the National Labor Relations Board alleging violations of Section 8(b)(1)(A) and (2) in that:

> "Within the six months immediately preceding the filing of this charge, the above named labor or-

ganization has, in the operation of its Los Angeles hiring halls, caused and/or attempted to cause employer to discriminate against employees in violation of Section 8(a)(3) of the Act.

"Within six months preceding the filing of this charge, the above named labor organization has, in the operation of its Los Angeles hiring halls, breached its duty of fair representation of all employees who are members of said labor organization, by discriminating against the charging party and other employees who are members of said labor organization in regard to job referrals, all in violation of Section 8(b)(1)(A) of the Act."

(2) Thereafter, in accordance with the United States Administrative Procedure Act, the charged parties, (Local 300) entered into negotiations with the Regional Director of the National Labor Relations Board for settlement of the charge. Settlement was reached, requiring, among other things, substantial changes in the operation of the hiring hall, and payment of back pay and fringe benefits to four alleged discriminatees.

(3) The charging parties (plaintiffs herein) refused to enter into the Settlement Agreement and the Regional Director approved it unilaterally. Thereafter, the charging parties filed their Notice of Appeal to the General Counsel of the National Labor Relations Board from the action of the Regional Director and on October 26, 1973, the Office of Appeals affirmed in part and reversed in part.

(4) Upon remand to the Regional Director, the Union negotiated a new Settlement Agreement covering those areas in which the charging parties had been sustained on their appeal and a new Settlement Agreement, together with Notice, was executed on or about December 28, 1973. Again, the charging parties re-

fused to join in the settlement and the settlement was unilaterally approved by the Regional Director and thereafter an appeal was taken to the Office of Appeals of the General Counsel from the decision of the Regional Director.

The Decision of the Court of Appeal.

The decision of the Court of Appeal of the State of California totally upsets the doctrine of preemption. It has created a duality of remedy which Congress and your Honorable Court have indicated does not exist. In essence, it is the conclusion of the Court of Appeal that the doctrine of preemption is no longer applicable to cases involving breach of duty of fair representation, no matter what the basis of that breach may be. Specifically, even in those areas where the alleged action constitutes a violation of federal labor law and is a matter of primary interest and exclusive concern of the National Labor Relations Board, the state court holds that the complainant may simultaneously bring a lawsuit to vindicate these rights.

To support this otherwise untenable position, the court has concluded that in the face of a collective bargaining agreement, 301 jurisdiction is applicable to permit a member to sue his union even though a proceeding is then pending before the National Labor Relations Board concerning the identical matter which is the subject of the lawsuit.

In sum, a charging party may simultaneously litigate an unfair labor practice case before the National Labor Relations Board and a civil case before the Superior Court of the State of California. This flies directly in the fact of *Capitol Service v. NLRB*, 347 U.S. 501 and *NLRB v. Nash-Finch Company*, 404 U.S. 138.

REASONS FOR GRANTING THE WRIT.

The problems here presented represent a destructive attack upon the primary jurisdiction of the National Labor Relations Board to hear and resolve unfair labor practice charges. The decision of the court below, in effect, has amended 29 U.S.C. 187 which permits both administrative and judicial remedies in the case of violation of Section 8(b)(4) of the National Labor Relations Act so as to permit such litigation in the case of all violations of the National Labor Relations Act, so long as the plaintiff can show that a collective bargaining agreement exists. In effect, Section 301 of the Act (29 U.S.C. 185) has been permitted to swallow up Section 303 (29 U.S.C. 187).

The doctrine of preemption where the matter in issue is of primary concern to the National Labor Relations Board, under the National Labor Relations Act has been totally repealed by the court below. The potential for conflicts between the National Labor Relations Board in the exercise of its statutory duties, and trial courts, becomes enormous. The instant case is a classical example.

It is a hiring hall type of charge over which the National Labor Relations Board has traditionally exercised jurisdiction and over which it is presently exercising jurisdiction. It is a type of charge which your Honorable Court in *Local 100 of United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, found to involve an unfair labor practice of pri-

mary federal concern and delegated by Congress exclusively to the National Labor Relations Board.

Notwithstanding, it is the contention of the California court that while the matter is in litigation before the Labor Board, an independent action involving the identical charges may be brought before the Superior Court of the State of California.

In one fell swoop, Section 301 of the Act and the doctrine of "breach of duty of fair representation" have been used as the hammer and the anvil to completely destroy the doctrine of preemption and the primacy of the National Labor Relations Board in those areas where Congress has specifically delegated exclusive jurisdiction to the National Labor Relations Board.

ARGUMENT.

I

The Court of Appeal Erred in Finding Jurisdiction in The Face of Evidence of an Unfair Labor Practice Charge of Primary Federal Concern and Delegated by Congress Exclusively to the National Labor Relations Board.

It appears astonishing at this late date that the doctrine of preemption must once again be argued.

In the landmark case of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, the United States Supreme Court held that, in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in all cases in which the activity that is the subject matter of litigation is arguably subject to the protections of Section 7, or the prohibitions of Section 8, of the National Labor Relations Act. Numerous cases have applied the *Garmon* rule to divest the state court of jurisdiction over an action involving claims arguably within the jurisdiction of the National Labor Relations Board. See, *e.g.*, *Local 100 of United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (holding that a local union's conduct in refusing to refer a union member to a particular job, possibly because of that member's failure to live up to the internal code of the union prohibiting solicitation to work from any contractor, was arguably subject to National Labor Relations Board jurisdiction and, therefore, the state court did not have jurisdiction over a suit by that union member against the local and international union for damages); *Local No. 207, Interna-*

tional Association of Bridge Structural, and Ornamental Iron Workers v. Perko, 373 U.S. 701 (holding that a union member's state court suit against a local union and certain of its officers for damages because they caused him to be discharged and prevented his subsequent employment as a foreman and superintendent was not cognizable in state court, since it was at least arguable that the union member was an employee within the National Labor Relations Act and that, therefore, the National Labor Relations Board might well find that the act charged in the complaint was an unfair labor practice by the union).

Nor is the decision of the Supreme Court in *Vaca v. Sipes*, 386 U.S. 171 to the contrary even though it has been suggested that the *Vaca* ruling permits state court jurisdiction of actions by union members against their unions whenever discriminatory treatment is alleged.

That *Garmon* is the general rule and that *Vaca* is an exception to *Garmon* and is to be narrowly limited to its facts is made patently clear by the language of *Vaca*. It said that only in dealing with a factual situation

> "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB," held an action seeking damages for injury inflicted by a breach of a union's duty of fair representation during grievance procedures after discharge was cognizable by state courts."

In addition, the per curiam Supreme Court affirmance of *Tyree v. Edwards, supra*, 287 F.Supp. 589, precludes reliance on *Vaca v. Sipes, supra*, 386 U.S. 171 where, as here, the discriminatory conduct involved is the failure to dispatch from a union hiring hall. (Affd., *sub*

nom., Alaska v. International Union of Operating Engineers, 393 U.S. 405 [21 L.Ed.2d 633, 89 S.Ct. 684].) In *Tyree,* a three-judge district court held an Alaska statute which regulated a union's hiring hall was preempted by federal legislation. Apart from the state statute issue, the court also held a superior court injunction which prohibited the discriminatory dispatching of union members from a hiring hall intruded into the exclusive jurisdiction of the National Labor Relations Board. The court noted:

> "In *Vaca,* the Court was concerned with discriminatory cases 'where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB [Fn. omitted].' Clearly, the Court did not intend that state courts were henceforth to have concurrent jurisdiction with the National Labor Relations Board of all unfair labor practice proceedings in which discriminatory conduct is alleged. [Fn. omitted]." (287 F.Supp. 589, 595.)

The heart of the plaintiff's case below and the Court of Appeals' decision hinges on *Motor Coach Employees v. Lockridge,* 403 U.S. 274.

However, lost in the state court's decision is the fact that in *Lockridge* the United States Supreme Court applied *Borden* (*Local 100 Plumbers Union v. Borden,* 273 U.S. 960) to the *Lockridge* case and held that jurisdiction rested exclusively with the Labor Board. The balance of the Opinion was a discussion of the circumstances under which jurisdiction *might* exist if the *Borden* principle were not present.

II

The Decision of the Court of Appeal Attempts to Distinguish Borden by the Lack of Existence of a Collective Bargaining Agreement and Thus Opens the Door to a Duality of Independent Remedies Which Has Been Specifically Condemned by the Supreme Court.

In its Opinion, the Court of Appeal engages in a torturous exercise in judicial nitpicking in order to avoid the impact of *Borden* on its fact. At page 10 of the typewritten Opinion, the court below says:

> "The *Lockridge* court emphasizes at some length that no issue of breach of a duty of fair representation is there involved."

However, as this court said in *Vaca v. Sipes, supra,* breach of the duty of fair representation exists *only* in a factual situation where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB.

This is completely consistent with the language of *Lockridge* which likewise indicated that no issue of breach of a duty of fair representation is involved where the conduct is such that it can be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB. The Court of Appeal, in its Opinion, sets forth one-half of the *Lockridge* finding without the essential second half, the fact of exclusive Board jurisdiction.

Thereafter, at pages 10-11, the court comes up with one of the most dramatic explosions of jurisdiction which can be contemplated. It purports to distinguish *Borden* from the case at bench by pointing out that in *Borden* there existed no collective bargaining agreement and that the hiring provisions allegedly vio-

lated in the instant case are set forth in a collective bargaining agreement and therefore 301 relief is available.

The enormity of the court's conclusion beggars the imagination. In effect, what the court has said, is that even though the National Labor Relations Act vests exclusive jurisdiction in the National Labor Relations Board over specific unfair labor practices which are of primary importance in the federal system and intended for the exclusive jurisdiction of the NLRB, that if such unfair labor practices arise during the term of a collective bargaining agreement, then any party to the collective bargaining agreement, an employer, union or employee, not only has the remedy under the National Labor Relations Act, but has an independent contractual remedy independent of the Labor Board proceedings.

If there were general jurisdiction in the court under Section 301 to entertain suits for commission of unfair labor practices generally, there would have been no need to enact Section 303 which creates civil causes of action for two specific violations of the Act, the secondary boycott provision and the jurisdictional strike provision, neither in point here. This would clearly indicate that Congress only intended this duality of administrative and judicial remedy to exist where Section 8(b)(4) is involved. It did not intend to grant general jurisdiction to the courts to entertain suits for commission of unfair labor practices generally. *Amazon Textile Mill Company v. Textile Workers Union* (CA 4) 167 F.2d 183.

The court below states at pages 7-8 of its Opinion that it relies on *Smith v. Evening News Association*, 371 U.S. 195; *Humphrey v. Moore*, 375

U.S. 335 and *Motor Coach Employees v. Lockridge*, 403 U.S. 274.

We submit that this reliance is misplaced.

None of these cases stands for the proposition that union members may sue their union under Section 301 of the Act.

Thus, in *Humphrey v. Moore, supra*, the employees brought suit against their employer and the union to restrain the enforcement of a form of arbitration determination which led to the layoffs of the plaintiffs upon the dovetailing of two company seniority lists.

We repeat, it involved a suit against the employer *and* layoff and discharge.

The court points out that if the union, which had control of half of the arbitration machinery, conspired with the employer to permit the discharge of the plaintiffs, then the plaintiffs were not obligated to exhaust their administrative remedies under the contract or, if those administrative remedies upheld their discharge, they could disregard the result of that administrative remedy and *sue their employer*.

The arbitration award would not be a bar to such a suit against the employer.

This, the Supreme Court said, gave rise to an action under Section 301 of the Act (pp. 343-344). Mr. Justice Goldberg, in his concurring opinion, did not even think that a claim under 301 arose under the circumstances alleged, but at most that a cause of action lay against the union for breach of its duty of fair representation arising out of the union's statutory obligation to represent employees equally and fairly *with employers*.

All of the cases cited by Justice Goldberg beginning with *Syres v. Oil Workers International Union*, 350 U.S. 892, posit liability upon the union where the charge is that the union is not representing the employee fairly *with the employer* (pp. 351-352).

A similar review of *Motor Coach Employees v. Lockridge*, 403 U.S. 274, indicates a similar concept.

The majority decision pointed out that the constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: To avoid conflicting regulations of conduct by various official bodies which might have some authority over the subject matter (pp. 285-286).

Considering that the appellants have presently pending before the National Labor Relations Board a charge charging the identical conduct which is the subject of this action, the rationale of preemption is particularly pertinent:

> "The rationale for preemption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes of effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system. Thus, that a local court, while adjudicating a labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal act or may eschew the authority to define or apply

> principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent." (pp. 288-289).

That plaintiffs have denominated their complaint as one under Section 301 or for breach of fair representation does not avoid the application of preemption.

> "Preemption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law is explicitly rejected in Garmon itself. 359 U.S. at 244, 3 L Ed 2d at 782." (p. 292).

In examining the *Borden* decision which is crucial to the instant case, this court pointed out what distinguished your prior decisions in *Machinists v. Gonzales,* 356 U.S. 617, and the *Borden* decision was that:

> "The possibility that, in defining the scope of the union's duty to Gonzales, the state courts would directly and consciously implicate principles of federal law was at best tangential and remote. In the instant case, however, this possibility was real and immediate. To assess the legality of his union's conduct toward Gonzales, the California courts needed only to focus upon the union's constitution and bylaws. Here, however, Lockridge's entire case turned upon the construction of the applicable union security clause, a matter as to which, as shown above, federal concern is pervasive and its regulation complex." (p. 296).

Thus, this court reviewed *Borden* and expressly reaffirmed it as valid law.

The concept that a 301 action would lie against the union was nowhere considered by the court in *Lockridge*. As a matter of fact, Justice Harlan pointed out that the attempt to state a cause of action under 301 failed because the *employer* had been dropped as a party from the complaint (p. 299).

Contrary to appellants' contentions, subsequent decisions of the federal courts fully support the position of the respondents that an action will not lie under Section 301.

> "Section 301 provides for bringing actions for violations of contracts between an employer and labor organizations in a district court, but it does not confer jurisdiction in suits between an employee and a labor organization. Palnau v. Detroit Edison Company et al., 301 F 2d 702, 49 LRRM 3140, CA 6, 1962; Copra et al. v. Suro et al., 236 F 2d 107, 38 LRRM 2355, CA 1, 1956."
>
> *Smith v. Pittsburgh Gage & Supply Co.*, 245 F.Supp. 864, aff'd 361 F.2d 219.

Finally, *Smith v. Evening News Association, supra,* again, involved a lawsuit against an employer, seeking enforcement of a collective bargaining agreement as a third party beneficiary.

Mr. Justice Blackmun, then sitting on the Court of Appeals for the Eighth Circuit, has put into context the entire dispute before this court and the purported

attempt to use Section 301 to create a cause of action in the face of NLRB exclusive jurisdiction:

> ". . . the complaint here alleges no more than that the defendant union has refused to send the plaintiff out on any employment and has discriminated against her in seeking employment and has thus deprived her of earning a living. This amounts, however, only to a routine allegation of an unfair labor practice and a violation of § 8 (b)(2). It presents a controversy clearly within the jurisdiction of the Labor Board. And it is the kind of controversy with respect to which it has been historically held that the Board has exclusive jurisdiction to afford primary relief. Adams v. International Bhd. of Boilermakers, 262 F.2d 835, 838-39, (10 Cir. 1959); Portland Web Pressmen's Union v. Oregonian Publishing Co., 286 F.2d 4, 10, (9 Cir. 1960) cert. denied 366 U.S. 912, Beauchamp v. Weeks, 48 LRRM 3048 (S.D. Cal. 1961). Even where an activity is only 'arguably subject to' § 8, 'the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *.' San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). See also, Local 100 v. Borden, ... U.S. ..... (1963), and Local No. 207 v. Perko, ... U.S. ..... (1963).
>
> Plaintiff's avenue of relief therefore was through the NLRB. In fact, she started to seek her remedy there by the filing of her charge but, upon the Acting Regional Director's declining to issue a complaint, chose not to pursue the matter further by appeal to the General Counsel as provided by

§ 3(d) of the 1935 Act, as amended, 29 U.S.C.A. § 153(d), and by § 102.19 of the applicable Regulations, 29 U.S.C.A. App. § 102.19. This was an abandonment of the administrative remedy then available to her. This inaction served to create no alternative district court jurisdiction in a matter so exclusively placed by Congress in the Board. Her brief's mere assertion to us now that there was 'no reason to believe the General Counsel would do anything but affirm the Acting Regional Director's findings' has no significance and accomplishes nothing. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 47, 1-A LRRM 575 (1938); Smith v. General Truck Drivers, 181 F. Supp. 14, 18-19, 45 LRRM 2848 (S.D. Cal. 1960); Mallory Coal Co. v. National Bituminous Coal Comm'n, 99 F.2d 399, 407 (D.C. Cir. 1938).

There are of course, areas where NLRB jurisdiction, although existent, is not exclusive. Statutory provision is even made for the Board in its discretion to decline jurisdiction over a class of employers. Section 701(a) of the 1959 Act, 29 U.S.C.A. § 164(c)(1). The allegations of this complaint, however, do not place this case in any exceptional category. Smith v. Evening News Ass'n, 371 U.S. 195, 51 LRRM 2646 (1962), cited by the plaintiff, lends no support to her position. The present case is not a damage action brought by the plaintiff against her employer for breach of a collective bargaining agreement, as was the situation in Smith where the court held that § 301(a) of the 1947 Act, 29 U.S.C.A. § 185(a), concerning contract violations authorized court relief even though the employer's conduct was also an unfair

labor practice subject to NLRB jurisdiction. This case bears no resemblance to Smith and § 301(a) has no relevance here."

Barunica v. Hatters Local 5 (CA 8) 321 F.2d 764.

As Justice Blackmun so tersely put it,

"This case bears no resemblance to Smith and 301 (a) has no relevance here."

The Court of Appeal also cites *Buzzard v. Local Lodge 1040 IAM*, 480 F.2d 35.

To begin with, it is necessary to examine the rather novel background which gave rise to the court's decision and the limited scope of the court's decision.

A dispute arose between an employer and a union, both subject to the Railway Labor Act. As a result of that dispute, certain picketing occurred. As part of a written settlement resolution of the dispute, the parties entered into a written agreement which provided, in part, as follows:

"There will be no reprisals, recriminations, disciplinary actions, grievances, or reprimands by either party against any employee represented by IAM because of any action or non-action during or arising from the strike."

Notwithstanding, thereafter the union attempted to discipline certain members who then brought suit against the union to enjoin the disciplinary proceedings.

The Court of Appeal, in reversing an order denying a preliminary injunction, relied primarily upon the union's duty of fair representation.

In also seeking to buttress its ruling as to this limited issue, the Court also said:

> "While we have been unable to find any case for the proposition that Section 301 will support a suit by a union member against his union for redress from union refusal to honor rights conferred on employees by *union* promises in the collective bargaining agreement, we are convinced that Section 301 does confer such jurisdiction. The union's duty of fair representation is equally violated when it refuses arbitrarily and in bad faith to honor *its* obligations, under a collective bargaining agreement, which are designed to benefit its members." (Emphasis by the Court).

The hiring hall provisions which are the subject of the instant action are *employer* promises designed to benefit a work force, not a *union* promise. *Buzzard* is *sui generis*. The confession of the court that it could find no case for the proposition that Section 301 will support a suit by a union member against his union followed by the tortured reasoning to support such authority, is foreign to the facts of this case.

The *Buzzard* decision quickly caught the eye of numerous law review writers. It was most generously reviewed in 122 University of Pennsylvania Law Review 714 at page 716, with the summarization:

> "The 9th Circuit's Buzzard decision appears to have been arrived at by an erroneous reading of the jurisdictional case law and a faulty analysis of the duty of fair representation."*

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*"Fair representation and Breach of contracts in Section 301 Employee-Union suits: Who's Watching the Backdoor?" 122 Penn. Law Review 714.

At page 8 of its Opinion, the Court of Appeal also relies on *Arnold v. Carpenters District Council,* .... U.S. ...., 40 L.Ed.2d 620.

A reading of the *Arnold* case likewise indicates that it is wholly inappropriate and no basis for reliance in this case since it involves a suit by an employer against the union for breach of contract, the breach being a breach of that portion of the contract dealing with resolution of jurisdictional disputes. Not only did the decision limit itself to a question to whether or not injunctive relief could be granted under the doctrine of *Boys Market Inc. v. Retail Clerks Union,* 398 U.S. 235, but it is significant that it involved a jurisdictional dispute in an area where Congress has specifically granted an independent right to bring suit for commission of an unfair labor practice notwithstanding the existence of a remedy before the Board (Section 302 of the Act). As the Attorney General of the United States noted in his brief, Section 10(k) of the Act (29 U.S.C. 160(k)) which establishes a special procedure for charges involving jurisdictional disputes, provides:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

In other words, *Arnold* stands for the proposition that an arbitration clause in a collective bargaining agreement may be enforced by injunctive relief, a proposition with which we do not quarrel. The Attorney General went on to observe that the United States Supreme Court under Section 10(k):

> "Not only tolerates but actively encourages the voluntary settlements of work assignment controversies between unions . . ."
>
> *Carey v. Westinghouse*, 375 U.S. 261, 266.

Thus, not only is *Arnold* no support at ail for the court's position, it is, rather, contrary to the court's position. Since the dispute in *Arnold* essentially involved a dispute concerning representation and this court in *Carey v. Westinghouse, supra,* had carved out a limited area wherein a question of representation might be invoked before a private tribunal, you went on to say that under those circumstances, if the National Labor Relations Board had exercised its jurisdiction, then the private remedy was preempted (pp. 271-272).

The importance of the *Carey* case cannot be overemphasized. It not only spelled out the limited extent of judicial jurisdiction, but likewise made clear that the judicial jurisdiction existed *only* until the Board acted. Once the Board acted, judicial jurisdiction was gone.

Section 301 must be interpreted in a fashion so as to avoid potential conflict with the National Labor Relations Board.

> *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 29.

An action under 301 must yield to Board action.

United Assn. v. Foley (CA 9, 1967) 380 F.2d 474, 476;

Rivas, Inc. v. New Orleans Typo. Union (CA 5, 1966) 368 F.2d 755, 767.

Thus, of all of the cases cited by the Court of Appeal, where the question of unfair labor practices and 301 suits had been considered, the unfair labor practice has been one of peripheral interest and the 301 jurisdiction of primary interest subject always to the right of the Labor Board to exercise its preemptive jurisdiction.

The identical contention here made, that 301 jurisdiction is complementary to Board jurisdiction in hiring hall cases, has been specifically rejected on numerous occasions.

In *Adams v. Boilermakers* (CA 10) 262 F.2d 835, the Court said:

> "It follows that the court did not have jurisdiction over the subject matter under § 301 (a), supra.
>
> The allegations of the complaint relating to discrimination by the International Brotherhood and Lodge No. 83 in regard to tenure of employment of the plaintiffs, if true, constitute unfair labor practices and violation of §§ 7 and 8 (b) (1) and (2) of the Labor Management Relations Act of 1947. However, Congress has given exclusive jurisdiction over such violations to the National Labor Relations Board and the district courts do not

have jurisdiction to give primary relief with respect thereto.[6]"

(See also: *Born v. Laube et al.* (CA 9) 213 F.2d 407, cert. den. 348 U.S. 855).

That unfair labor practices cannot be the basis for judicial relief (except where expressly permitted by Congress in Section 303 of the Act), and that the complainant is left to his remedy at the Board, is a principle of long standing.

Friendly Society etc. v. Calico Engraving Co., (CA 4) 238 F.2d 52.

(Applying *Borden* in the face of collective bargaining agreements and alleging discrimination of invidious or political reasons against members.)

Green v. Local 705 Hotel Employees, 220 F. Supp. 505.

In *Retail Clerks v. Schermerhorn,* 375 U.S. 96, in dealing with the question of jurisdiction over collective bargaining agreements, the court held that since Section 14(b) gave the states power to outlaw any form of union security in collective bargaining agreements, it also gave the state courts the power to enforce the state law. However, at page 104, the Court by way of contrasting example, stated:

"We held in *Plumbers' Union v. Borden,* 373 U.S. 690, and in *Iron Workers v. Perko,* 373 U.S. 701, that *Garmon* preempted the field where employees were suing unions for damages arising out of practices that arguably were unfair labor practices subject to regulations by the National Labor Relations Board."

"[6]Holman v. Industrial Stamping and Manufacturing Co., D.C. Mich., 142 F.Supp. 215, 38 LRRM 2343; Amazon Cotton Mill v. Textile Workers Union of America, (4 Cir.) 167 F.2d 183, 21 LRRM 2605."

Lockridge, in affirming the *Borden* principle, dealt with a collective bargaining agreement (which the Court of Appeal felt was the key distinguishing factor) and said:

> "Here, however, Lockridge's entire case turned upon the construction of the applicable union security clause, a matter as to which, as shown above, federal concern is pervasive and its regulation complex."
>
> *Motor Coach Employees v. Lockridge,* 403 U.S. 296.

The "hiring hall" provisions in collective bargaining agreements and especially in the construction industry have always been a matter of special congressional and Board concern. In discussing the legislative history of Section 8(a)(3) of the Act as it relates to hiring halls, the U.S. Supreme Court noted the particular complexity of federal concern in determining when the hiring hall violated the Act and the power of the Board in fashioning a remedy for that violation.

Local 357 v. NLRB, 365 U.S. 667.

The Board decisions on the question of application of hiring hall provisions of contracts for internal political discriminatory purposes are legion, and only a few samples need be cited.

For example, a refusal to dispatch for failure to support an incumbent officer in an election or criticism of union officers found violative of 8(b)(1) and (2).

Laborers Local 207 (A & E Construction), 206 NLRB No. 128, 84 LRRM 1474;

Local 1098, Carpenters (Chauncey Construction Co.), 186 NLRB 385, 75 LRRM 1458;

Operating Engineers Local 18 (C. F. Braun), 205 NLRB No. 146, 84 LRRM 1349.

Such Board decisions have regularly been affirmed.

Lummus v. NLRB (CA DC 1964) 339 F.2d 728;

Local 1351 v. NLRB (CA DC 1964) 329 F.2d 259;

NLRB v. Bechtel (CA 10, 1964) 328 F.2d 28;

NLRB v. Laborers Union (CA 8, 1962) 300 F.2d 328.

From all of these cases, it appears that the magic which the Court of Appeal attributed to the existence of a collective bargaining agreement with its hiring hall provisions as distinguishing this case from *Borden* was not only not magic, it was not even good sleight of hand. Rather, it was more like Pandora attempting to open the box just a slight crack, for the obvious conclusion of the court's rationale is that by judicial interpretation, two remedies exist for the solution for unfair labor practices merely by the existence of a written contract. No court can create such a duality of remedies when it was not the intent of Congress so to do.

It is apparently the premises of the court below that if there exists a collective bargaining agreement, then any unfair labor practice between the parties gives rise to the duality of remedies, one before the Board and one in the Court. This fallacy is apparent.

When Congress intended this duality of independent remedies to exist, it said so when it adopted Section 303 of the Act dealing with damage actions for secondary boycotts and jurisdictional disputes.

> "The main contention of petitioners in the case is that § 303(a) (4) read in light of § 8(b) (4)

(D) renders illegal only such picketing as takes place after and in the face of a determination by the Board that the acts complained of were unfair labor practices. If that conclusion is warranted, there must be a reversal here since the damages reflected in the present judgment for the most part accrued prior to the decision of the Board, under § 10(k) of the Act, that petitioners had committed an unfair labor practice within the meaning of § 8(b)(4)(D).

Section 8(b) (4) (D) and § 303(a) (4) are substantially identical in the conduct condemned. Section 8(b)(4)(D) gives rise to an administrative finding, § 303(a)(4), to a judgment for damages. The fact that the two sections have an identity of language and yet specify two different remedies is strong confirmation of our conclusion that the remedies provided were to be independent of each other. Certainly there is nothing in the language of § 303(a)(4) which makes its remedy dependent on any prior administrative determination that an unfair labor practice has been committed. Rather, the opposite seems to be true. For the jurisdictional disputes proscribed by § 303(a) (4) are rendered unlawful 'for the purposes of this section only,' thus setting apart for private redress, acts which might also be subject to the administrative process. The fact that the Board must first attempt to resolve the dispute by means of a § 10(K) determination before it can move under § 10(b) and (c) for a cease and desist order is only a limitation on administrative power, as is the provision in § 10(K) that upon compliance 'with the decision of the Board or upon

such voluntary adjustment of the dispute,' the charge shall be dismissed. These provisions, limiting and curtailing the administrative power, find no counterpart in the provision for private redress contained in § 303(a)(4). Section 303(a)(4) are explained by Senator Taft, its author, 'retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike.' "

International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation, 342 U.S. 237, 243-244.

III

The Court of Appeal Extends the Doctrine of Failure of Duty of Fair Representation Over Matters Which Congress Has Delegated Exclusively to the National Labor Relations Board.

This court passed upon identical contentions in *Vaca v. Sipes*, 386 U.S. 171, and rejected them.

First, *Vaca v. Sipes* dealt with a factual situation "*where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB.*" (emphasis added). This court went on to indicate, and supported by substantial federal authority, that *Vaca* has been limited to cases where arbitrary or bad faith conduct amounting to unfair representations during grievance procedures after discharge is shown, and in a factual situation where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. As you subsequently pointed out in *Lockridge*, the doctrine of breach of the duty of fair representation only arises where the risk of conflict with the general congressional policy favoring expert,

centralized administration, and remedial action is tolerably slight (p. 301).

However, this must be read in the light of your discussion of the distinction between that type of conduct where the risk is tolerably slight against your discussion at page 296 of *Borden* and *Perko* as examples of that type of conduct in which the danger of conflict was great and therefore fell under the preemptive shield.

The power of the Labor Board to fashion appropriate remedies in this particular area is no longer a matter of question. The Board has created any number of innovative remedies for hiring hall violations including orders for back pay and interest to alleged discriminatees. *NLRB v. Local 542*, 329 F.2d 512; *Local 1566 Longshoremen ILA*, 145 NLRB 1417; *Local 138, Operating Engineers*, 151 NLRB No. 102; *Local 925, Operating Engineers*, 168 NLRB 818; *Carpenters, Local 180*, 175 NLRB No. 159.

The Board has gone as far as granting back pay relief to members of a class of discriminatees including those not named in the charge filed with the Board. Thus, the Board has the power to grant class action relief. *NLRB v. Midwest Transfer*, 287 F.2d 443.

Cases subsequent to *Lockridge* involving hiring halls have been consistent with *Borden*.

> "Insofar as plaintiff's complaint alleges that defendant unions have deprived plaintiff of employment in his former occupation by coercing prospective employees not to hire plaintiff, this court's jurisdiction to grant relief is pre-empted by the National Labor Relations Board. San Diego Building Trades Council etc. v. Garmon, 359 U.S. 236, 79

S.Ct. 773, 3 L. 3d 2d 775 (1959). As stated recently by the Supreme Court, Garmon 'established the general principle that the National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act.' Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 276, 91 S.Ct. 1909, 1913, 29 L ed 2d 473 (1971). Section 8(b)(2) makes it an unfair labor practice for a union

> "to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

"It is clear that any conduct allegedly taken by the defendants in an effort to prevent an employer to hire plaintiff in his former occupation is 'arguably subject to §7 or §8 of the Act.' Furthermore, action by a union to coerce an employer not to hire a person because of his prior expulsion from the union was for reasons other than a failure to tender dues is certainly not a purely internal union matter. Thus, this aspect of plaintiff's claim for relief is not governed by the International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L ed 2 1018 (1958) precedents that support state and federal diversity court jurisdiction over purely internal union matters. See Amalgamated Association of Street, Electric Railway

and Motor Coach Employees of America v. Lockridge, supra, 403 U.S. at 293-297, 91 S.Ct. 1909."

REW v. International Org., Masters, M & P of Am., Inc., 349 F.Supp. 542, 545.

For the foregoing reasons, it is submitted that the doctrine of fair representation and breach thereof is not appropriately before the court, especially in the face of a pending labor board proceeding.

It is suggested inferentially by the Court of Appeal that the doctrine of preemption is being gnawed away. It places such reliance upon *Machinists v. Gonzales*, 356 U.S. 617, and *Automobile Workers v. Russell*, 356 U.S. 634.

Preemption is not dead.

In the first *Garmon* case, the United States Supreme Court said that a court could not grant judicial relief where the problem was one over which the National Labor Relations Board had primary jurisdiction (*San Diego Building Trades v. Garmon*, 353 U.S. 26).

In one of the last decisions issued by your court last term, the court reemphasized the preemptive nature of the National Labor Relations Act by circumscribing *Lin v. Plant Guard Workers Local 114*, 383 U.S. 53, which is usually also cited with *Russell* and *Gonzales* as representing peripheral federal interests by reversing a state court judgment and holding that the defamatory statements contained in a union publication during an organizational drive is the subject of National Labor Relations Board interests and National Labor Relations Board preemption. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al. v. Austin, et al.* (June 25, 1974) .... U.S. ...., 86 LRRM 2740.

IV

There Is No Jurisdiction Under Section 301 to Authorize a Suit Between Dissident Members of Unions Arising Out of Intra-Union Politics and Unrelated to Dealings Between the Union and Employers.

At pages 6-7 of the state court's decision, it sweepingly states that:

> "In addition to the decisional law exception to the *Garmon* rule permitting state court jurisdiction in a limited class of disputes involving solely the internal affairs of a union, Section 301 of the National Labor Relations Act (29 U.S.C. Section 185) is construed to permit an action by an employee in the state court to enforce his rights under a collective bargaining agreement."

It is difficult to see how the dependent clause is supported by the independent clause of the foregoing sentence. We assume that the court, in referring to "decisional law exception" refers to *Machinists v. Gonzales, supra, Russell v. Machinists, supra,* and *Linn v. Plant Guards, etc., supra,* but none of these in any way support the proposition that Section 301 is the basis for jurisdiction in those cases. As a matter of fact, the reading of each and every one of those cases is to the contrary. Even the court's footnote supports a nonexistent legal premise.

All of the "decisional law exceptions" are those in which the Supreme Court has found that the federal interest is peripheral to an overriding state interest. They are the exceptions to the rule. However, since 1947, the union hiring hall has been a matter of primary, overriding federal concern and has never been a "decisional law exception to the *Garmon* rule" and the

invocation of Section 301 is totally unsupported. As we have heretofore indicated, each case relied upon by the Court of Appeal below was one involving an action against the *employer*. Even in *Vaca v. Sipes, supra,* the court indicated that where the unfair labor practice was not one of primary concern to the Board, then the Union was a necessary party to the action in order for the plaintiff to avoid the employer's defense of failure of exhaustion of administrative remedies and in those cases the union was only liable for the collateral damages sustained in requiring the employee to bring his action in order to avoid the doctrine of exhaustion of administrative remedies but that the employer was principally liable for the alleged violation.

V

The Decision of the Court of Appeal Permits Judicial Proceedings in the Face of a Failure to Exhaust Administrative Remedies.

The doctrine of exhaustion of administrative remedies is recognized under federal law.

> *Smith v. General Truck Drivers Local 467,* 151 F.Supp. 14.

Here, appellants have invoked the Board's jurisdiction and they are under an obligation to exhaust the Board's jurisdiction. It is significant that the question of the obligation to exhaust Board remedies as a condition precedent to judicial action has been specifically reserved by the United States Supreme Court in the first *Garmon* decision (*San Diego Building Trades v. Garmon,* 353 U.S. 260, fn. 2).

As Justice Blackmun noted in *Barunica v. Hatters, supra,* where the Labor Board has primarily jurisdic-

tion, the plaintiff's avenue of relief was through the NLRB. This was precisely the type of case which he felt was primarily for the administrative procedure of the NLRB.

In the instant case, appellants apparently are in the position of wanting to be able to enjoy their cake and having it also. Before commencing this suit, they filed their unfair labor practice charge with the National Labor Relations Board (a proceeding which because of the necessity of inquiry into the special incidents of each member of the class, is still pending).

Here, however, it is not just the jurisdiction of the tribunal, but jurisdiction of the subject matter which is at issue and it is one where the administrative agency has paramount jurisdiction (*Capitol Service v. NLRB*, 347 U.S. 501; *NLRB v. Nash-Finch Company*, 404 U.S. 138).

VI

Federal Law Does Not Permit Suits Against Individual Union Representatives for Alleged Non-Violent, Tortious Breach of Duty of Fair Representation.

The Court of Appeal states at page 12 of its Opinion that the demurrers of the individual defendants Renteria and Enriquez were properly sustained. However, it goes on to state that "the complaint alleges no tortious acts of the individual defendants. Since, however, we reverse the judgment of dismissal as to the union, appellants should be given the opportunity to amend their complaint, if they desire, to attempt to state a cause of action against the individuals."

Here, again, the court cites no authority for the proposition that individual defendants may be held liable for non-violent torts arising out of their failure to adequately represent a member.

The complaint affirmatively alleges at paragraphs V and VI that defendants, Renteria and Enriquez, were at all times agents of Local 300. As disclosed agents, there is no liability upon their part, in any event, under either state law or federal law.

The most recent discussion of the subject of application of federal law as against a known agent of a disclosed principal appears in *Sackett v. Wyatt*, 32 Cal. App.2d 592.

In applying federal law, the court concluded that even a nonviolent tort of a union representative acting as the known agent of the disclosed principal exempted him from a personal liability. The union, as an entity, must be the sole source of recovery (*Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 249).

If the complaint had alleged that individual defendants acted wilfully, wantonly or maliciously, and with intent to deprive plaintiffs of their rights under the collective bargaining agreement hiring hall provisions, they would still be exempt from personal liability under *Atkinson v. Sinclair, supra*, and *Sackett v. Wyatt, supra.*

Conclusion.

For the reasons stated, this petition for a writ of certiorari should be granted.

Dated: October 17, 1974.

LIONEL RICHMAN,
IVAN J. POTTS,
Attorneys for Petitioners.

APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Alfred P. Magallanes and Antonio E. Olea, in behalf of themselves and all others similarly situated, Plaintiffs and Appellants, v. Local 300, Laborers' International Union of North America, an unincorporated association; Manuel Renteria and Carlos Enriquez, Defendants and Respondents. Civil No. 42801 (Sup. Ct. No. C 46862).

Filed: July 22, 1974.

APPEAL from an order of the Superior Court of Los Angeles County. Charles S. Vogel, Judge. Reversed.

Finkel and Herring, and Neil M. Herring for Plaintiffs and Appellants.

Richman & Garrett, Ivan J. Potts, Walter C. Appling, and Lionel Richman for Defendants and Respondents.

In this appeal from a judgment of dismissal after a demurrer was sustained to appellants' complaint without leave to amend, we consider the issue of state court subject matter jurisdiction to enforce the rights of a union member against his union created by a contract negotiated by the union on his behalf with an employer and created by a union's "duty of fair representation." We conclude that the facts alleged in the complaint at bench state causes of action cognizable in the state courts and accordingly reverse the judgment.

The complaint alleges the following facts which we accept as true for the purpose of this proceeding. Appellants are members of Local 300, Laborers' International Union of North America (Union). Union entered into a collective bargaining agreement with construction contractors denominated "Laborers' Short-Form Agreement, Eleven Southern Counties of California, 1970-1974" (Agreement). Article II, section D of the Agreement is entitled "Referral Procedure." Describing the manner in which workers are to be dispatched to jobs, article II requires the contractor parties to the Agreement to call the Union's hiring hall serving the geographic area of the hiring contractor's project. In response to the call, the hiring hall is required to dispatch workers for the project "strictly in accordance with the provisions of [the] Agreement." The Agreement states that then skilled applicants who have registered their names on employment lists "shall be referred on a first-in, first-out basis; . . . the first man registered in that group shall be the first man referred." The only exception to "first-in, first-out" referral to work deals with employees laid off by the contractor within the preceding 270 days and is not here applicable. Subsection 7 of section D of the Agreement states: ". . . The selection of applicants for dispatchment to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by Union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of Union membership, policies or requirements."

Appellants were internal political opponents of the incumbent administration of Union. Because of that opposition, Union discriminated against appellant and other members similarly situated by repeatedly and ar-

bitrarily refusing to dispatch them for employment in violation of article II, section D of the Agreement. As a result, on July 27, 1972, appellant Magallanes filed a charge with the National Labor Relations Board alleging that Union had caused or attempted to cause employer discrimination against employees in violation of section 8(a)(3) of the National Labor Relations Act. (29 U.S.C. § 158(a)(3).) While the matter was before the National Labor Relations Board, appellants, suing for themselves and the class of others similarly situated, commenced the action which is the case at bench.[1] They asserted that the superior court had jurisdiction of the matter by reason of section 301 of the National Labor Relations Act (29 U.S.C. §185). Appellants named Union as a defendant and joined Manuel Renteria and Carlos Enriquez in their capacities as officer, agent, and employee of Union. The complaint is framed in two counts: the first alleging the breach of the collective bargaining agreement and the second alleging malicious, oppressive, and fraudulent breach of a duty of fair representation owed by Union to all members of the collective bargaining group. The latter cause of action includes allegations that the discrimination in dispatching for jobs practiced by Union against named appellants and others similarly situated was for the purpose of silencing appellants' political opposition to policies of the incumbent management of Union and for the purpose of favoring other members of Union who politically or financially supported that management. Damages are alleged as proximately caused by the conduct of Union and other named defendants.

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[1]Respondents have requested us to take judicial notice of action by the Board taken while this appeal was pending. Since that matter was not before the trial court, we do not consider it on this appeal. Respondents may assert it for what it is worth after remand.

Respondents, the defendants named in the complaint, demurred to it, contending that: (1) exclusive jurisdiction of the controversy is vested in the National Labor Relations Board to the exclusion of the state courts because the activity which is the subject matter of the dispute is "arguably subject to the protections . . . of the National Labor Relations Act"; (2) the action is not properly maintainable as a class action; and (3) no cause of action is stated against the individual defendants. The trial court sustained the demurrer solely on the ground that it lacked jurisdiction of the subject matter. We conclude that the complaint states a cause of action within state court jurisdiction, that class maintainability is not here reachable on demurrer, and that as to the individual defendants, the complaint fails to state a cause of action but that leave to amend should be granted.

Subject Matter Jurisdiction. "The statutory implications concerning what [jurisdiction] has been taken from the States [by the National Labor Relations Act] and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." (*Machinists v. Gonzales*, 356 U.S. 617, 619 [2 L.Ed.2d 1018, 78 S.Ct. 923].) In the oracular process of elucidation, the United States Supreme Court has successively adopted and abandoned a number of tests of federal preemption of subject matter jurisdiction of disputes in the area involving management, unions, and working people. At first, the high court focused on consistency of state court remedies with the provisions of the federal act as the touchstone of state jurisdiction. (*Automobile Workers v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 [93 L.Ed. 651, 69 S.Ct. 516].) Discarding that ap-

proach, the United States Supreme Court suggested that state court jurisdiction depended upon the state supplying a remedy not available in the federal scheme. (*Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 [99 L.Ed. 546, 75 S.Ct. 480].) Subsequently, the high tribunal suggested that states had subject matter jurisdiction of labor related disputes whenever general common law was applied. (*Automobile Workers v. Russell*, 356 U.S. 634 [2 L.Ed.2d 1030, 78 S.Ct. 932].)

In *San Diego Unions v. Garmon*, 359 U.S. 236 [3 L.Ed.2d 775, 79 S.Ct. 773], the Supreme Court adopted still a new, and more encompassing view of federal preemption of the field. In *Garmon*, the court dealt with an action filed by an employer in the California court seeking damages from a union for picketing to compel the execution of a collective bargaining agreement where the employer's employees had not indicated membership in the union. In holding that the state court lacked jurisdiction to proceed because subject matter jurisdiction was preempted by the federal law, the United States high court said: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act [29 U.S.C. § 157, establishing the right of employees to organize and bargain collectively], or constitute an unfair labor practice under § 8 [of the National Labor Relations Act, 29 U.S.C. § 158, proscribing various forms of employment discrimination], due regard for the federal enactment requires that state jurisdiction must yield." When it is not clear whether the activities are governed by section 7 or section 8, such initial determination must be made by the National Labor Relations Board. (*San Diego Unions v. Garmon, supra*, 359 U.S. 236, 244-245.)

The broad sweep of the *Garmon* rule is subject to two classes of exception, one developed in decisional law and the other from judicial construction of section 301(a) of the National Labor Relations Act (29 U.S.C. § 185(a)).

Where a dispute focuses solely upon internal union affairs and does not have a direct and immediate effect upon an employee's present or future employment status, the litigation is deemed of merely peripheral concern to the National Labor Relations Act and hence cognizable in the state courts despite the potential incidental applicability of the federal act. (*Machinists v. Gonzales*, 356 U.S. 617 [2 L.Ed.2d 1018, 78 S.Ct. 923], confirmed in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 295 [29 L.Ed.2d 473, 91 S.Ct. 1909]; *NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 [36 L.Ed.2d 752, 93 S.Ct. 1952].) Where, however, the dispute involving internal union affairs also has a direct and immediate effect upon present or future employment, it is "arguable" that the conduct violates section 8(b)(2) of the National Labor Relations Act so that the *Garmon* rule applies. (*Plumbers' Union v. Borden*, 373 U.S. 690, 697 [10 L.Ed.2d 638, 83 S.Ct. 1423].) In the first category of cases, unfair discrimination in employment is deemed merely incidental so that the National Labor Relations Act is not sufficiently involved to preempt state court jurisdiction. In the second category, the involvement with federal law preempts the field.

In addition to the decisional law exception to the *Garmon* rule permitting state court jurisdiction in a limited class of disputes involving solely the internal affairs of a union, section 301 of the National Labor Relations

Act (29 U.S.C. § 185)[2] is construed to permit an action by an employee in the state court to enforce his rights under a collective bargaining agreement. The issue was addressed squarely by the United States Supreme Court in *Smith v. Evening News Assn.*, 371 U.S. 195 [9 L.Ed.2d 246, 83 S.Ct. 267]. There an employee-union member was locked out as a result of a strike by members of another union although nonunion members were retained on the job. He sued his employer in a Michigan court claiming breach of a provision in a collective bargaining agreement that "there shall be no discrimination against any employee because of his membership in the Guild." Refusing to apply the *Garmon* rule despite a contention that the claim, if true, would "make out an unfair labor practice under the National Labor Relations Act," the United States Supreme Court said: "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the court in suits under § 301." (*Smith v. Evening News Assn., supra*, 371 U.S. 195, 197.) The court stated expressly, in addition, that an individual employee might call upon the court to exercise its jurisdiction to vindicate his rights under a collective bargaining agreement (371 U.S. at pp. 199-200), and approved state

[2]"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of all the parties. . . ." The jurisdiction of state courts over suits alleging violations of collective bargaining agreements is concurrent with federal court jurisdiction under this section. (*Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 [7 L.Ed.2d 483, 82 S.Ct. 519].) The substantive law which the state court must apply in such cases is federal. (*Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 102-104 [7 L.Ed.2d 593, 82 S.Ct. 571].)

court jurisdiction by upholding the judgment of the Michigan court. (See also *Arnold v. Carpenters District Council,* ..... U.S. ..... [..... L.Ed.2d ....., ... S. Ct. .....], 42 U.S. Law Week. 4754; *McCarroll v. L.A. County etc. Carpenters,* 49 Cal.2d 45, 63 [315 P.2d 322].)

Section 301 is similarly construed to sanction a suit in a state court by an employee against his union for breach of a collective bargaining agreement where the breach is related to a breach of the union's duty of fair representation of its members. (*Humphrey v. Moore,* 375 U.S. 335 [11 L.Ed.2d 370, 84 S.Ct. 363], characterized in *Motor Coach Employees v. Lockridge, supra,* 403 U.S. 274, 299; *Buzzard v. Local Lodge 1040 Int. Ass'n of Mach. & A. Wkrs.* (9th Cir. 1973) 480 F.2d 35.) The breach of that duty, i.e., the responsibility of a union selected as a bargaining agent by employees to discharge its agency by representing the interest of each employee fairly and impartially making "an honest effort to serve the interests of all [its] members, without hostility" and in complete good faith and honesty (*Humphrey v. Moore, supra,* 375 U.S. at p. 342, citing *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337-338 [97 L.Ed. 1048, 73 S.Ct. 681]) may also be redressed in an action brought by the employee against the union in a state court although unaccompanied by a breach of a collective bargaining agreement. (*Vaca v. Sipes,* 386 U.S. 171 [17 L.Ed.2d 842, 87 S.Ct. 903], characterized in *Motor Coach Employees v. Lockridge, supra,* 403 U.S. 274, 299.)

Here the complaint at bench encompasses a suit by individual employees against a union alleging one cause of action for the union's breach of a provision of a col-

lective bargaining agreement, a breach which is related to the union's duty of fair representation to plaintiffs, its members. It contains a second cause of action alleging breach of the duty of fair representation alone. The breach lies in the failure of the union honestly or fairly to discharge the duty to its members undertaken by it when it, as their agent, negotiated the collective bargaining agreement. Contrary to that duty and for reasons of internal union politics, Union breached a provision of the agreement by discriminating in dispatching plaintiffs, appellants, to jobs. *Smith, Humphrey,* and *Vaca, supra,* declare that the California court has jurisdiction to entertain both causes of action.

Respondents' contention to the contrary and the rationale of the trial court's decision sustaining respondents' demurrer for lack of state court jurisdiction are founded primarily upon the United States Supreme Court decisions in *Motor Coach Employees v. Lockridge, supra,* 403 U.S. 274 and *Plumbers' Union v. Borden, supra,* 373 U.S. 690. Both are distinguishable from the case at bench.

Lockridge was a member of the Motor Coach Employees Union. The union had signed a contract with Western Greyhound Lines containing a union security clause requiring that all employees of Western remain members of the union as a condition precedent to continued employment. The union constitution provided for automatic suspension of a member two months in arrears in his dues. Misconstruing the constitution, the union suspended Lockridge and obtained his dismissal by Western because of the union security clause of the collective bargaining agreement. Lockridge sued the union in an Idaho court, obtaining a judgment. The United States Supreme Court, applying the rule of *Garmon,*

held that exclusive jurisdiction of the dispute was in the National Labor Relations Board. It reasoned that no breach of the duty of fair representation was sued upon or involved so that *Humphrey* and *Vaca* did not apply.

On the facts alleged in the complaint in the case at bench, it is the *Smith, Humphrey,* and *Vaca* principle and not the *Lockridge* application of the rule of *Garmon* that controls. In *Lockridge,* the suit was not bottomed upon the collective bargaining agreement which apparently did not contain a provision restricting the union's right to discriminate against its own members, but rather upon the by-laws of the union which were violated in a fashion directly affecting the employee's right to present and future employment. *Lockridge* thus seems squarely within the ambit of *Plumbers' Union v. Borden, supra,* 373 U.S. 690. The *Lockridge* court emphasizes at some length that no issue of breach of a duty of fair representation is there involved. (*Motor Coach Employees v. Lockridge, supra,* 403 U.S. 274, 300.) In the case at bench, as in *Smith* and *Humphrey,* the first cause of action is bottomed upon breach of a provision of a collective bargaining agreement for the benefit of the plaintiff employees, a breach related to the defendant union's breach of its duty of fair representation to the plaintiffs. In the case at bench, as in *Vaca,* the second cause of action alleges a breach of the duty of fair representation.[3]

As the matter at bench is different from *Lockridge,* it is also materially distinguished from *Borden.* While *Borden,* as does the case at bench, treats of union discrimination in hiring hall practices, there it is in the

[3]The second cause of action may or may not be deficient substantively. If deficient, it seems clearly amendable.

sole context of an internal union matter affecting present and future employment and not in relation to a contract negotiated in collective bargaining by a union as sole representative of the employee. (373 U.S. at p. 691; see also *International Brotherhood of Teamsters, etc. of America v. Superior Court,* 20 Cal.App.3d 517 [97 Cal.Rptr. 765].) The union's dereliction was one proscribed by sections 8(b)(1)(a) and 8(b)(2) of the National Labor Relations Act (373 U.S. 690, 694), and section 301 was inapplicable. In the case at bench, the hiring hall discrimination is in breach of a collective bargaining agreement and is alleged to have occurred in relation to a breach of a duty of fair representation in implementation of it. It is the nature of the lawsuit and not whether a hiring hall is involved that determines state court jurisdiction of labor matters. The nature of the causes of action alleged in the complaint bring it within the rather narrow area where the United States Supreme Court has determined that state court jurisdiction exists by reason of section 301 of the National Labor Relations Act. (*Shaw v. Metro-Goldwyn-Mayer, Inc.,* 37 Cal.App.3d 587 [113 Cal.Rptr. 617].)

Exhaustion of Administrative Remedy. Respondents contend that the demurrer was properly sustainable for failure of appellants to exhaust their remedies before the National Labor Relations Board. The identical contention has been rejected by our Supreme Court in *Grunwald-Marx, Inc. v. L.A. Joint Board,* 52 Cal.2d 568 [343 P.2d 23]. *Grunwald* dictates that the contention be rejected here.

Class Action. Respondents contend, also, that the action at bench is not properly maintainable as a class action. In the context of the case at bench, the issue is

not one properly determinable on demurrer but must await further proceedings in the trial court. (*La Sala v. American Sav. & Loan Assn.*, 5 Cal.3d 864, 883 [97 Cal.Rptr. 849, 489 P.2d 1113]; *Beckstead v. Superior Court*, 21 Cal.App.3d 780, 783 [98 Cal.Rptr. 779].)

Individual Defendants. The demurrers of the individual defendants Renteria and Enriquez were properly sustained. The complaint shows on its face that the individual defendants were agents and officers of the union. Absent tortious conduct on their part, they are not liable to third persons for conduct in the course of their agency. (Civ. Code, § 2343.) The complaint alleges no tortious acts of the individual defendants. Since, however, we reverse the judgment of dismissal as to the union, appellants should be given the opportunity to amend their complaint, if they desire, to attempt to state a cause of action against the individuals.

Disposition. The judgment is reversed.

CERTIFIED FOR PUBLICATION

Thompson, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*